

**Award**  
**FINRA Dispute Resolution Services**

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In the Matter of the Arbitration Between:

Claimant

Daniel James Baumgartel

Case Number: 20-03883

vs.

Respondent

Edward Jones

Hearing Site: Seattle, Washington

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Awards are rendered by independent arbitrators who are chosen by the parties to issue final, binding decisions. FINRA makes available an arbitration forum—pursuant to rules approved by the SEC—but has no part in deciding the award.

Nature of the Dispute: Associated Person vs. Member

**REPRESENTATION OF PARTIES**

For Claimant (“Claimant”) Daniel James Baumgartel: Frances Menzer, Esq. and Dochter Kennedy, MBA, J.D., AdvisorLaw, LLC, Westminster, Colorado.

For Respondent Edward Jones (“Respondent”): Connor M. Trafton, Esq. and Melanie L. Ronen, Esq., Keesal, Young & Logan, Long Beach, California.

**CASE INFORMATION**

Statement of Claim filed on or about: November 23, 2020.

Claimant signed the Submission Agreement: November 23, 2020.

Statement of Answer filed by Respondent on or about: January 26, 2021.

Amended Statement of Answer filed by Respondent on or about: January 29, 2021.

Respondent signed the Submission Agreement: January 26, 2021.

**CASE SUMMARY**

In the Statement of Claim, Claimant asserted a claim alleging that the Form U5 filed by Respondent, as part of registration records maintained by the Central Registration Depository (“CRD”), is defamatory in nature.

In the Statement of Answer and Amended Statement of Answer, Respondent denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

In the Statement of Claim, Claimant requested:

1. An award granting expungement of the Form U5 corresponding with Occurrence Numbers 1558978 and 1456955, and those relevant portions of the Form U4, from Claimant's CRD records on the basis that the statement is defamatory in nature, misleading, inaccurate, and/or erroneous, to include:
  - a. amendment of the Reason for Termination entry in Section 3 of Claimant's Form U5 to read "Voluntary";
  - b. expungement of the Reason for Termination explanation on Claimant's CRD records;
  - c. amendment of the answer to Question 7B of Claimant's Form U5, from a "Yes" response to "No";
  - d. amendment of the answer to Question 14J(1) of Claimant's Form U4, from a "Yes" response to "No"; and
  - e. deletion of the Internal Review and Termination Disclosure Reporting Pages accompanying Occurrence Numbers 1558978 and 1456955;
2. An award of damages in the amount of \$1.00 from Respondent for its part in contributing to Claimant's injury; and
3. Any other relief as the Arbitrator deems just and equitable.

In the Statement of Answer and Amended Statement of Answer, Respondent requested:

1. Claimant take nothing by way of his Statement of Claim;
2. Claimant's request for expungement be denied;
3. Costs; and
4. Such other and further relief as the Arbitrator may deem just and proper.

### **OTHER ISSUES CONSIDERED AND DECIDED**

The Arbitrator acknowledges having read the pleadings and other materials filed by the parties.

On January 29, 2021, Respondent filed an Amended Statement of Answer to clarify that it asserts an affirmative defense pursuant to FINRA Rule 13206, not FINRA Rule 12206 of the Code of Arbitration Procedure ("Code").

On August 23, 2021, Respondent filed a Motion to Dismiss pursuant to Rule 13206 of the Code. On September 1, 2021, Claimant filed a response opposing the Motion to Dismiss. On September 7, 2021, Respondent filed its reply in support of the Motion to Dismiss. On September 21, 2021, the Arbitrator heard oral arguments on the Motion to Dismiss. The Arbitrator hereby grants the Motion to Dismiss for the reasons stated in the Findings section below.

Respondent's Motion to Dismiss pursuant to Rule 13206 of the Code is granted by the Arbitrator without prejudice to any right Claimant has to file in court; Claimant is not prohibited from pursuing his claims in court pursuant to Rule 13206(b) of the Code.

### **FINDINGS**

The claim was filed by Claimant against his former employer, Respondent, seeking expungement of his CRD records, Occurrence Numbers 1558978 and 1456955. These both

appear on Claimant's BrokerCheck® Report and both arise from the involuntary termination of his employment by Respondent in Shelton, Washington. Claimant also contends both occurrences are false and libelous and seeks \$1.00 in damages from Respondent.

Respondent contends the claim is untimely and seeks dismissal under FINRA Rule 13206.

Claimant argues extensively, and the Arbitrator agrees, that under the Federal Arbitration Act 9 U.S.C. §1 *et seq.*, the Uniform Arbitration Act as adopted by Washington, *Chapter 7.04 Rev. C. WA*, the rules and regulations establishing the FINRA Dispute Resolution Services forum, and the submission agreements of the parties, and FINRA Rule 13206(b)(7), that it is beyond cavil that the forum/arbitrator have both personal and subject matter jurisdiction. The issue is not whether the forum/arbitrator has jurisdiction, but whether jurisdiction should be exercised.

There is a common thread running the public policy, judicial policy, and legislative and executive enactments of every Anglo-American jurisdiction: old or stale claims become barred by the passage of time. This does not mean the claim is extinguished, but simply that the compulsory process of courts and/or arbitrators may no longer be used to enforce the claim. These are typically termed statutes of limitation, statutes of repose, equitable laches, time bars, etc. and share the same theme and result. When a claimant sits on a claim after a specified period of time, that claim will not be enforced. The rationale for these rules is both obvious and oft-repeated: The passage of time dulls memories, witnesses die, retire, move from the jurisdiction, or otherwise become unavailable, records are lost or destroyed, etc.

Rule 13206(a) states:

“No claim shall be eligible for submission to arbitration under the Code where six years have elapsed from the occurrence or event giving rise to the claim. The panel will resolve any questions regarding the eligibility of a claim under this rule.”

The six-year period was not a random choice. It directly coincides with the record retention requirement imposed on broker-dealers by the SEC and FINRA Rule 4511.

Claimant was involuntarily terminated by Respondent on April 23, 2009. The subject claim was filed on or about November 23, 2020. The incident reports were filed contemporaneously with Claimant's involuntary termination. There was a delay of just over 9 ½ years between the incident giving rise to the claim for expungement and the filing of the complaint. This is *prima facie* within the terms of the Rule making the case ineligible for arbitration in this forum.

The Arbitrator finds no evidence or credible legal authority for a tolling of a statute of limitation or that would otherwise render Rule 13206 inapplicable. Rather, Claimant argues that as the record is public and is examined at various times by member of the public or potential employers within the securities industry, that each day that a member of the public reviews Claimant's BrokerCheck® Report constitutes a new publication of the alleged libel, i.e., that an ongoing harm to Claimant tolls the limitation period.

The Arbitrator concurs with Claimant's assertion that a FINRA Arbitrator is vested with broad discretion to interpret and apply the six-year limitation period. But the Arbitrator must reject Claimant's argument that libel is a continuing tort. First, it is contrary to the public policy described above. Second, it is contrary to (i) the general rules of American libel law establishing

the date upon which a libel is deemed to have been committed and the applicable statute(s) of limitation begins to run, (ii) the general American rule in libel cases that there is no tolling of the limitation period due to non-discovery of a purported libel contained in a public records of a public agency, and (iii) the general American rule that libel is not a continuing tort. Third, and most significantly, accepting Claimant’s reasoning would have the net effect of nullifying FINRA Rules 12206 and 13206—at least as to expungement claims.

For the foregoing reasons, the Arbitrator finds the claim ineligible for adjudication in the FINRA forum pursuant to Rule 13206(a) and therefore Respondent’s Motion to Dismiss is GRANTED.

**AWARD**

After considering the pleadings, the testimony and evidence presented at the September 21, 2021 recorded pre-hearing conference, the Arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimant’s claims are dismissed without prejudice, pursuant to Rule 13206 of the Code.
2. Any and all claims for relief not specifically addressed herein are denied.

**FEES**

Pursuant to the Code, the following fees are assessed:

**Filing Fees**

FINRA Dispute Resolution Services assessed a filing fee\* for each claim:

Initial Claim Filing Fee	= \$	50.00
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*\*The filing fee is made up of a non-refundable and a refundable portion.*

**Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. Accordingly, as a party, Respondent is assessed the following:

Member Surcharge	= \$	150.00
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**Postponement Fees**

Postponements granted during these proceedings for which fees were assessed or waived:

November 8-9, 2021, postponement requested by Claimant	= \$	50.00
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Total Postponement Fees	= \$	50.00
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The Arbitrator has assessed the total postponement fees to Claimant.

**Hearing Session Fees and Assessments**

The Arbitrator has assessed hearing session fees for each session conducted. A session is any meeting between the parties and the Arbitrator, including a pre-hearing conference with the Arbitrator, which lasts four (4) hours or less. Fees associated with these proceedings are:

Two (2) pre-hearing sessions with a single Arbitrator @ \$50.00/session	= \$	100.00
Pre-Hearing Conferences: March 12, 2021	1 session	
September 21, 2021	1 session	
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Total Hearing Session Fees	= \$	100.00

The Arbitrator has assessed the total hearing session fees to Claimant.

All balances are payable to FINRA Dispute Resolution Services and are due upon receipt.

**ARBITRATOR**

Daniel B. MacLeod

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Sole Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument, which is my award.

**Arbitrator's Signature**

***Daniel B. MacLeod***

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Daniel B. MacLeod  
Sole Public Arbitrator

**09/23/2021**

\_\_\_\_\_  
Signature Date

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September 23, 2021

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Date of Service (For FINRA Dispute Resolution Services use only)